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No. 92-9049

In The

Supreme Court of the United States

October Term, 1993

ALFRED ARTHUR SANDOVAL,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

PETITIONER'S REPLY BRIEF

ERIC S. MULTHAUP*
KATHY M. CHAVEZ
235 Pine Street, Suite 1300
San Francisco, CA 94104
(415) 821-6000

Attorneys for Petitioner

* Counsel of Record

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I. SUMMARY AND OVERVIEW

Conspicuously absent from the bevy of briefs filed by respondent and various amici curiae is a direct response to petitioner's extensive survey of objective source materials – dictionaries and newspapers – in which the phrase "moral certainty" is defined or used in a manner *in*consistent with the constitutional standard of proof beyond a reasonable doubt. The purpose of the survey was to provide a basic reference point for determining how reasonable jurors would understand "moral certainty" as the linchpin of the reasonable doubt instruction in this case, and it revealed a striking incompatibility between the current usage of the phrase "moral certainty" and the core concept of proof beyond a reasonable doubt. To illustrate, petitioner has inserted dictionary synonyms of "moral certainty" into hypothetical reasonable doubt jury instructions, yielding patently unconstitutional results:

> – You may convict if you find that the defendant's guilt is "probable though not proved," *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993).
>
> * * *
>
> – You may convict if you find the defendant's guilt is "[b]ased on strong probability," *Webster's New World Dictionary of American English* (3rd College ed. 1991).
>
> * * *
>
> – You may convict if you find the defendant guilty "[b]ased on a firm conviction rather than on the actual evidence," *American Heritage Dictionary of the English Language* (3d ed. 1993).
>
> * * *
>
> – You may find defendant guilty "[b]ased on strong likelihood of conviction rather than on solid evidence," *Webster's II New Riverside Dictionary* (1988).

All but one of the other dictionaries surveyed by petitioner contain meanings similarly inconsistent with proof

beyond a reasonable doubt.[1] Respondent and amici curiae have chosen to ignore this extensive survey of objective reference materials – "One cannot rely purely on dictionaries, of course, to provide definitive statements of the meanings jurors ascribe to words and phrases employed in jury instructions," Respondent's Brief, p. 20; hereinafter "RB." Instead, they argue that jurors would likely ascribe to the phrases a meaning *different* from that extant in the world at large when hearing the key phrases in the context of a courtroom – "In the actual instruction these phrases operate to convey ideas quite different from those petitioner ascribes to them in abstract isolation." RB 8. While respondent pejoratively characterizes the meanings petitioner ascribes to "moral certainty" as occurring in "abstract isolation," they are in fact the meanings found in ordinary usage.

An analysis of the instruction in this case – both the component phrases and the sum of the parts – in the context of the record as a whole demonstrate more than a reasonable likelihood that the jury convicted petitioner upon a standard of proof less than the constitutional requirement of proof beyond a reasonable doubt.

II. FLAWS AND FALLACIES IN RESPONDENT'S ARGUMENTS

A. Respondent's Failure to Address the Array of Dictionaries and Other Objective Reference Materials Cited by Petitioner

Respondent and amici curiae disregard both common sense and case law in dismissing every reliable indicator of contemporary language usage as mere "dictionary definitions" (RB 20) that "do not materially aid" the inquiry (RB 16) how petitioner's jury likely understood its instructions.

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[1] Regarding the Oxford English Dictionary (hereinafter "OED"), see pages 7-8, *infra*.

1. The particular value of empirical reference materials in determining how jurors would likely understand this instruction

Reference to dictionaries, newspapers, and other empirical reference materials is particularly relevant to this Court's task of determining the likelihood that jurors in this case applied the reasonable doubt instruction in a manner inconsistent with the Constitution. Dictionaries *reflect* common meanings of words and phrases as they occur and evolve in real world usage. They do *not* promulgate prescriptive meanings which might or might not filter down to the lay populace from which jurors are drawn. American dictionaries particularly emphasize their *descriptive* function, as their prefaces make clear. For example, an introductory chapter to the *American Heritage Dictionary of the English Language* (3d ed. 1993) recounts Thomas Jefferson's refusal to preside over an American Academy "for refining, correcting, improving, and ascertaining the English Language." Jefferson asserted that the European model of a centralized linguistic arbiter was ill-suited to the certainty of linguistic change accompanying the social, economic, and political development of America, a premise adopted by American lexicographers.[2] See also the preface to the *Random House College Dictionary* (1980), describing the editor's efforts to ensure that "[m]any recent

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[2] The preface, entitled "A Natural History of English: Language, Culture and the American Heritage," concludes:

> Instead of rules from a National Academy of English, Americans accepted the common-law customs of intelligent conversation *with all its modifications through time and circumstance*. . . . [H]istory shows the correctness of Jefferson's message. *He recognized the certainty of change*, the function of language as a cultural tool, and the importance of thoughtful selection of vocabulary. Through common-law customs of speech and writing the national language develops words and documents social facts. This Dictionary orders those materials of discourse, records the natural history of a people, and transmits the substance of the American heritage. *Id.* at xxiii; emphasis supplied.

words have been included, as have new meanings of old words," and that "definitions have often been modernized or improved." *Id.* at v. Thus, American dictionaries endeavor to describe actual contemporary usage, rather than to ordain some particular usage as correct or desirable independent of its actual usage. Respondent's refusal to acknowledge the overwhelming weight of dictionary and newspaper sources is highly suspect. When, as here, a constitutional question turns on how lay jurors likely understood a particular instruction, common sense suggests that dictionaries and similar sources should be a primary reference point for this Court, not preemptively consigned to insignificance as respondent urges.

Reliance on extrinsic reference points is particularly appropriate in this case where the crucial phrases, "reasonable doubt" and "moral certainty," have been incorporated into the lexicon of law-trained people in a very different manner than they are used by the public at large, a point ably made by the Attorney General of Nebraska[3]. "Moral certainty" was adopted as a legal term of art 150 years ago, and judges and lawyers have been repeating it to each other in a mutually reinforcing manner ever since. During the same period, the meaning of the phrase changed significantly in common parlance *outside* the legal profession. Thus, there is a strong probability that lawyers and judges as law-trained personnel hear these phrases as reaffirming an exacting burden of proof while lay jurors understand the phrases as articulating a lesser burden.

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[3] "As jurists and lawyers we may think we understand that phrase (after years of study and consideration), but under *Boyde* that is *not* the test. The test is the commonsense understanding of those words by a lay jury." Brief of Nebraska, p. 24; emphasis in original.

2. This Court's longstanding reliance on dictionaries and similar sources to elucidate the common meanings of statutes, regulations, and other provisions

Respondent and amici curiae appear to be unaware of a settled feature of this Court's jurisprudence in which reference is routinely made to dictionaries to elucidate the meaning of words and phrases contained in disputed statutes or other writings. This Court regularly relies on dictionaries for both current and historical meanings. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 113 L.Ed. 690, 695 (1991) ("From the time of the founding to the present, the word 'seizure' has meant 'a taking possession,' " citing Webster's 1828 edition and *Webster's Third New International Dictionary* (1986)). Moreover, this Court looks to dictionaries to determine whether a word has developed current usages different from its original meaning. See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, ___ U.S. ___, 113 S.Ct. 2217, 2227 (1993) ("the words 'sacrifice' and 'ritual' have a religious origin, but current use admits also of secular meanings," citing *Webster's Third New International Dictionary*). Indeed, in the past 15 years alone, this Court has referred to dictionaries in more than 200 cases to understand or interpret a particular word or phrase.

Given this Court's substantial reliance on dictionary references as a basic source of information, the refusal of respondent and amici curiae (particularly the Solicitor General) to respond to petitioner's source materials must be viewed as a virtual concession by silence.[4] The Solicitor General argues that the *nineteenth century* case law accords synonymity to the phrases "proof beyond a reasonable doubt" and "moral certainty." S.G. Brief, p. 19. This point is accurate

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[4] In contrast, petitioner is not imputing any talismanic effect to dictionary definitions; he simply urges this Court to give them the consideration generally accorded in this Court's jurisprudence.

although irrelevant to the meaning that a late *twentieth century* jury would give to the latter phrase. The Solicitor General's attempt to bridge the gap – "[n]or has the term lost its meaning in modern usage" – cites *not* contemporary lexicographical sources but four decisions of this Court in which the phrase "moral certainty" was used in passing, an inherently tangential response given that the constitutional focus is on the likely understanding of *jurors*, not jurists.[5]

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[5] The cited cases fail to support the Solicitor General's implicit premise that "moral certainty" is currently viewed as synonymous with "utmost certainty" by this Court. *Schneble v. Florida*, 405 U.S. 427, 431 (1972) in no way focused on the meaning of "moral certainty" language. Rather, the Court considered whether a *Bruton* violation was harmless in light of "petitioner's comprehensive confession," and noted that the jury could not have convicted Schneble unless it relied on his confession – "Charged as they were by the judge that they must be 'satisfied beyond a reasonable doubt' and 'to a moral certainty' of Schneble's guilt before they could convict him, the jurors could on no rational hypothesis have found Schneble guilty without reliance on his confession." *Id.* The excerpted quotation from the Florida jury instruction is so tangential to the determination of the case that it can hardly be impressed into service as a substantial lexicographical pronouncement by this Court. Next, this Court did not itself even use the phrase "moral certainty" in *McClesky v. Kemp*, 481 U.S. 279, 308, n. 29 (1987), but rather quoted a witness who happened to use the phrase in the course of testimony. *City of Canton v. Harris*, 489 U.S. 378, 390, n. 10 (1989), observed that "[c]ity policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons," a use of the phrase consistent with a *range* of degrees of certainty, including probability. Moreover, the Court used that phrase in a distinct sense of predicting a *future* event, not determining the existence of a prior event. In the Solicitor General's fourth citation, Justice White used the phrase "moral certainty" in his dissent in *Brewer v. Williams*, 430 U.S. 387, 434 (1977), stating that the defendant's knowledge of his right to counsel "is established on this record to a moral certainty," and urging that an intentional waiver was similarly shown. Given that the legal standard for proving a knowing waiver of the right to counsel is the *preponderance of the evidence*, *Lego v. Twomey*, 404 U.S. 477, 488 (1971), Justice White's use of the phrase adds no support to the Solicitor General's implicit assertion that this court understands the phrase "moral certainty" to be currently synonymous with "proof beyond a reasonable doubt."

The Solicitor General declined to cite the fifth instance in which the phrase "moral certainty" occurs in this Court's jurisprudence since 1950. In *California v. Minjares*, 443 U.S. 916 (1979), then-Justice Rehnquist, dissenting from a denial of a stay request, expressed a judiciously qualified belief that the exclusionary rule at issue in the case was an anomaly from an international law perspective – "I do not claim to be an expert in comparative law, but I feel morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence as to the guilt or innocence of the accused is mechanically excluded because of the manner in which it may have been obtained." *Id.* at 919.

That usage is entirely consistent with definitions such as "probable though not proved," *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993) and "[b]ased on a strong likelihood or firm conviction, rather than on actual evidence," *American Heritage College Dictionary* (3d ed. 1993). Indeed, while Chief Justice Rehnquist was generally correct in his observation, his judicious selection of the qualifying phrase "moral certainty" left room for reasonable disagreement, see, e.g., Schlesinger, Baade, et al., *Comparative Law* (1988), p. 425, fn. 25a ("Although modern civil law systems generally reject exclusionary rules of evidence, there are some recent German cases excluding evidence obtained in violation of a constitutionally protected right of privacy," referring to cases cited in Baade, "Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch," 51 Texas L. Rev. 1325 (1973).

3. Respondent's failure to offer any alternative reference point regarding the meaning of "moral certainty"

Respondent has presented nothing at all to controvert petitioner's demonstration of the meanings that "moral certainty" has evolved in twentieth century American usage. The only objective reference by respondent or amici is to the definition of moral certainty in the *Oxford English Dictionary*, which the District Attorney's Association triumphantly proclaims as "[t]he most recent, authoritative reference dictionary of the English language," citing to *The New Shorter Oxford English Dictionary* (Oxford, 1993). Petitioner readily acknowledges, as do lexicographers generally, that the Oxford dictionaries are authoritative sources as to what words *used* to

mean in their Anglo-Saxon origins, but not necessarily as to their *current* meaning. It is telling that the *only* dictionary cited by respondents and their amici is the dictionary singled out for its role in "provid[ing] a historical record of the development and meaning of each word," Landau, *Dictionaries: The Art and Craft of Lexicography*, p. 71 (1984).[6] Nor has respondent attempted to controvert petitioner by citing instances in the print or other media where the phrase "moral certainty" was used in a manner consistent with the concept of proof beyond a reasonable doubt.

B. Respondent's Refusal to Acknowledge That the Instruction in This Case Lacks Any of the Constitutionally Correct Components Found in Cage, Webster, and Other Reasonable Doubt Instructions

The primary thrusts of Respondent's Brief are that the putative defects in the instruction are neither coextensive with the *Cage* defects[7] nor as debilitating as petitioner asserts. Respondent ignores petitioner's complementary argument that the instruction suffers from defects of *omission* in addition to defects of *commission*. The *primary* feature of the instruction

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[6] Moreover, despite the characterization of the District Attorney's Association that the *Oxford English Dictionary* (OED) is the "most . . . authoritative reference dictionary," this Court *seldom* refers to it. During the past 15 years, this Court has in some 200 cases referred to dictionaries, but the *Oxford Dictionary* appears in fewer than ten percent of these cases. Furthermore, this Court has chosen to rely on definitions in American dictionaries when inconsistent with the OED. See, e.g., *Hartford Fire Co. v. California*, ___ U.S. ___, 113 S.Ct. 2891, 2912 (1993) (following *Webster's Third New International Dictionary* rather than the OED). Thus, respondent's reliance on the lone entry in the *Oxford English Dictionary* to support its position is hardly convincing in the face of the uniformly contradictory definitions in American dictionaries.

[7] *Cage v. Louisiana*, 498 U.S. 39 (1990). Petitioner argued that the *Cage* instruction established no monopoly on unconstitutional formulations, and pointed out that the *Cage* instruction had redeeming features absent from this instruction. Petitioner's Brief, pp. 35-36.

in this case, viewed as a *whole*, is that it contains none of the generally accepted and indisputably constitutional language currently in widespread use in explanatory instructions throughout the country; see Petitioner's Brief on the Merits, appendix B. In contrast to other instructions which contain one or more affirmative and constitutionally correct explanations of reasonable doubt, there is nothing clearly constitutional and correct about this instruction, as there was in the *Cage* instruction, or as exists in the larger passage in *Webster* from which the instant instruction was excerpted. The *Cage* instruction specifically informed the jury that "[e]ven where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused," 498 U.S. at 40. Similarly, the original *Webster* discussion of reasonable doubt[8] *and* the modern version of the *Webster* charge currently given in Massachusetts both contain language explicitly informing the jury that the level of certainty must be *greater than* a "strong probability."[9] See petitioner's Brief on the Merits, appendix B-18.

Nor does the instruction in this case contain any clear and accurate phrases such as "utmost certainty," *In re Winship*, 397 U.S. 358, 364 (1970) or a conviction "*approaching* absolute certainty," *Lanigan v. Maloney*, 853 F.2d 40, 47 (1st Cir. 1988) (emphasis in original). Nor does it include any version of the "hesitate to act" language long-since approved by this Court and currently used in a large number of states.[10]

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[8] *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850).

[9] See Mass. Model Jury Instructions 2.05 – "It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough."

[10] See *United States v. Holland*, 348 U.S. 121 (1954). Ten states currently employ some permutation of the "hesitate to act" explanation of reasonable doubt. See Petitioner's Brief, appendix B – Arkansas, Colorado, Connecticut, Idaho, Indiana, Iowa, New Mexico, Pennsylvania, South Carolina, and Texas.

An objective overview of the instruction in this case reveals it to be convoluted in structure, consisting of negatives, and lacking any clearly constitutional explanation of proof beyond a reasonable doubt. Respondent's reference to the "organic whole" of the instruction merely reinforces petitioner's assertion that the instruction *lacks* any constitutionally correct anchor. Rather, the instruction is comprised solely of the jurisprudential equivalent of leaks which individually and together dilute the standard of proof beyond a reasonable doubt.

C. Respondent's Untenable Insistence That the "To a Moral Certainty" Language Does Not Reduce the Constitutionally Required Level of Certainty

1. The meaning of "moral certainty"

The heart of respondent's argument on this point, RB 19, is that 1) the word "certainty" by itself "can hardly present an unacceptable likelihood that jurors will not only misunderstand but misunderstand it in a way that reduces the prosecution's burden"; and 2) the modifier "moral" or "morally" "does not operate to minimize any level of certainty," concluding with the *ipse dixit* that "one who is morally certain of the 'truth of the charge' is not *less* certain of it than one who is simply described as certain." To the contrary, modifiers generally alter the meaning of the word modified, and in this case the modifier "moral," in its sense of "probable though not proved," *Webster's Ninth Collegiate Dictionary*, 771 (9th ed. 1991), or "having a strong probability," *Collins' English Dictionary* (3d ed.), conveys a degree of conviction *less* than the utmost certainty required for proof beyond a reasonable doubt. Respondent literally offers nothing to the contrary but the *ipse dixit* "hardly."

2. The "abiding conviction" washout

Next, respondent argues that "[t]he linking of 'abiding conviction' and 'moral certainty' properly emphasizes the

high degree of proof needed to convict." RB 22. This argument simply ignores that in context, the prepositional phrase "to a moral certainty" *qualifies* the "abiding conviction" phrase. The mere fact that the two phrases are linked, without consideration of the grammatical *nature* of the linkage, does not establish that the phrases are equivalences. If, as petitioner has demonstrated, "moral certainty" conveys a lesser degree of certainty than proof beyond a reasonable doubt, the plain English meaning of the sentence instructs the jurors to convict when they feel an abiding conviction, to a lesser degree of certainty than beyond a reasonable doubt, of the truth of the charge.[11]

D. Respondent's Refusal to Recognize the Instruction's Interjection of Moral Considerations Into Jury Deliberations

Respondent misconceives petitioner's argument that the phrases "moral certainty" and "moral evidence" invite the

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[11] Respondent's citation of *Miles v. United States*, 103 U.S. 304 (1881), does not support its odd notion of "linking." Nothing in *Miles* suggests that the Court there viewed the language "abiding conviction in the mind to a moral certainty" as conveying either an equivalency or an independence of "abiding conviction" and "moral certainty" in defiance of explicit sentence structure. What *Miles* did do, of course, was to hold that 112 years ago there was no inconsistency between the constitutional standard of proof beyond a reasonable doubt and the then-current meaning of an "abiding conviction in the mind to a moral certainty." This is the *starting point* of petitioner's argument, which is based precisely on the fact that the phrase "moral certainty" has seen such a change in common usage during the past century that jurors can no longer reasonably be expected to take it as having its 1881 meaning. As soon as any twentieth-century reference materials are consulted – as they were in *State v. Bryant*, 432 S.E.2d 291 (N.C. 1993) – this change and the consequent undermining of the conventional premise of *Miles* becomes immediately apparent. *Bryant*, scrupulously ignored by respondent, also belies respondent's assertion that "[a]mong the cases petitioner cites in his brief on the 'moral certainty' question, none invalidates a reasonable doubt instruction on constitutional grounds." RB 25.

jurors to interject their moral and emotional responses to the evidence in determining guilt. Respondent asserts that "petitioner's dictionary and usage examples . . . in no way suggest that the phrase 'moral certainty' becomes *incomprehensible* when explicitly premised upon a foundation of objective evidence." RB 16; emphasis supplied. Petitioner has never argued that the phrase "moral certainty" is *incomprehensible* to jurors; to the contrary, petitioner argues that there is a reasonable likelihood that jurors understand it in accordance with its current meaning of "based on a strong likelihood of conviction rather than on solid evidence," *Webster's II New Riverside Dictionary; Webster's Third New International Dictionary* (1986). That definition comports with the way people make decisions in their personal and business affairs based on their moral certainty of a fact somewhat supported but not compelled by concrete evidence. As a matter of common sense and common parlance, there are innumerable instances where, for example, a fair-minded employer fires an employee for stealing, based on the employer's moral certainty of pilfering, even though the employer does not necessarily believe that theft can be proved beyond a reasonable doubt in the legal sense.

Regarding "moral evidence," respondent again mischaracterizes petitioner's argument in asserting that "[p]etitioner nevertheless suggests that phrases like 'moral evidence' are anachronisms *without meaning to a modern jury*." RB 32 (emphasis supplied). Petitioner has consistently argued that "moral evidence" *has* a modern meaning: one which is both different from its eighteenth and nineteenth century meaning and inconsistent with the constitutional standard of proof beyond a reasonable doubt. When the "moral evidence" phrase was used in jury instructions a century or more ago, it was a synonym for empirical evidence, i.e., everything that the jury would hear in the courtroom. That eighteenth-century Lockean meaning has been lost over time, and the phrase is now more likely to be understood as the equivalent of character evidence – "based on knowledge of the tendencies of human nature," *Collins English Dictionary*

(3d ed.), i.e., referring to the moral aspects of a defendant's conduct.

Finally, respondent refuses to acknowledge the deleterious effect of linking "moral evidence" and "moral certainty" in a reasonable doubt instruction. The instruction places an unconstitutional imprimatur on the jury's use of moral evidence, i.e., evidence of petitioner's "nature" as gang-oriented and violence-prone, to supplement the prosecutor's objective (but singularly unprepossessing) evidence of guilt. It thus legitimates a guilty verdict based in some part on the jury's assessment of petitioner's moral character as well as on the prosecutor's objective evidence. These phrases are not anachronistically innocuous; they are affirmatively misleading.

E. Respondent's Misplaced Reliance on Other Instructions, Arguments of Counsel, and Miscellaneous Matters to Mitigate the Damage

1. Other instructions

Respondent relies on the boilerplate introductory jury instruction as exerting a mitigating influence on the jurors' understanding of the reasonable doubt instruction, i.e., that they were directed "to determine the facts of the case from the evidence received in the trial and not from any other source," and to resist being influenced by "sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." CALJIC 1.00. The first part of the instruction simply tells the jurors not to rely on extrajudicial matters such as media publications, local gossip, or unauthorized experiments or inquiries. It does nothing to set the standard of proof or to deter jurors from including the moral aspects and impact of the courtroom evidence in their deliberations. The second part of the instruction lists inappropriate influences; conspicuously absent from the list are moral considerations. The public generally views moral values and considerations as highly *positive* influences, and jurors would likely bridle under a suggestion that their moral responses fell with the prohibited areas of "passion," "prejudice," or other undesirable influence.

Similarly, the fact that the phrase "beyond a reasonable doubt" was reiterated during the course of other jury instructions, albeit never explained, does not cure the constitutional error arising from the single defective *definition* of reasonable doubt given to the jury. While amicus District Attorney's Association notes that the instruction defining each offense charged against petitioner began with a phrase that "the burden is on the People to prove beyond a reasonable doubt each of the elements . . . ," Amicus Brief, p. 15, neither respondents nor amici suggests any logical mechanism by which the mere repetition of the phrase "beyond a reasonable doubt" cures the defects in the *definition* of this standard of proof as given to the jury. To the extent that the Attorney General of Nebraska is correct that "the concept of reasonable doubt, standing alone, has little meaning to most people" (Brief of Nebraska, p. 24), its repetition as a talismanic mantra can hardly ensure the jury's enlightenment as to the underlying concept.

2. Arguments of trial counsel

Next, respondent argues that "petitioner's trial counsel repeatedly made beneficial use of the very instructions petitioner now challenges in this appeal" (RB 28), and cites a number of instances in jury voir dire where the attorney merely parroted the phrase "beyond a reasonable doubt" and "to a moral certainty" in describing the prosecution's burden of proof. RB 28-29. However, as noted above, the mere reiteration of the phrase, whether or not it constitutes "beneficial use" of the instruction, hardly clarifies for the jury the level of certainty they need to convict.

Moreover, defense counsel confessed *confusion* about what the instruction meant:

> What we're talking about is an abiding conviction to a moral certainty of the truth of the charge. I'm not sure what that means exactly. I guess that you kind of know it when you see it. Do I have a doubt? Is that doubt reasonable? That is the question you have to ask. JA 79.

A fair reading of respondent's transcript citations negates any inference that counsel's voir dire or argument had *any* ameliorative effect in conveying to the jury a proper understanding of proof beyond a reasonable doubt. In one part of voir dire, cited by respondent (RB 28, n. 9), counsel asked whether a juror would defer to a "gut feeling" that "maybe he [petitioner] is involved" as sufficient to convict, or would abide by the court's instructions. JA 29-30. It is hardly a ringing endorsement of the proof beyond a reasonable doubt standard to extract a concession from a juror to forego reliance on gut feelings in favor of the court's instructions. This is apparently the *most* that respondent can muster from the record, and it is manifestly weak.[12]

3. Miscellaneous matters

Respondent also attempts to support the constitutionality of the instruction by referring to such extremely remote factors as 1) criminal defense manuals which contain suggested closing arguments employing the phrase "moral certainty" (RB 27-28); and 2) scattered appellate decisions from various jurisdictions in which defendants had complained of the omission of moral certainty language from their jury instructions (RB 26-27). The substantive import of these references is virtually nil, and it is telling that respondent relies on these

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[12] This would be a different record if defense counsel argued to the jury either in voir dire or in closing argument to the effect that "we all know that moral certainty in its common usage means a mere probability, or a belief based on something other than objective facts, but when used in court it has a different and specialized meaning of utmost certainty based solely on the objective evidence before you." If, for example, defense counsel had quoted and argued to the jury the article by Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850,* 38 Hastings L.J. 153 (1986), and argued that this jury must view the phrase "moral certainty" in the same manner as it was originally intended hundreds of years earlier, then respondent would have a legitimate point that defense counsel used it to petitioner's benefit. Of course, no explanatory gloss remotely like that was proffered by either the prosecutor or defense counsel during the course of the case.

tangential and remote factors to support his position, rather than on directly relevant lexicographical sources.

Respondent's argument fails for many reasons, one of which is that it is part of a defense attorney's trade to try to make lemonade out of legal and factual lemons arising in a particular case. One can only expect practical treatises, such as those cited by respondent, to suggest a positive spin to put on instructional language, but that hardly constitutes an affirmative endorsement of it. Moreover, the excerpted arguments cited by respondent (RB 27-28) in no way suggest that there exists a common understanding of "moral certainty" as synonymous with "utmost certainty." The only substantive point made in either argument is that proof beyond a reasonable doubt is greater than a probability, a point lacking in the instruction in this case.

Next, respondent and amicus curiae District Attorney's Association cite a smattering of cases from various jurisdictions which reject claims of error that "moral certainty" was not included in the reasonable doubt jury instruction. These cases obviously support *petitioner's* position. *All* of the cited cases reject the argument that "moral certainty" is a necessary component of a reasonable doubt instruction; *none* of the cases provide even dicta to the effect that "moral certainty" is widely recognized as conveying the quintessence, or even a functional facsimile of, proof beyond a reasonable doubt. Rather, the cases reflect widely isolated instances of defense attorneys asserting marginal claims of error against daunting odds, albeit in accordance with counsels' duty of vigorous representation. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (the Constitution requires that an indigent criminal appellant have "an active advocate, rather than a mere friend of the court assisting in the detached evaluation of the appellant's claims"); *McCoy v. Court of Appeal*, 486 U.S. 429, 100 L.Ed.2d 440, 457 (1988) ("the [defendant's] attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client").

It is unclear what respondent wishes this Court to read into the scattered cases *rejecting* moral certainty as a necessary component of a reasonable doubt instruction. The most that can be extracted is the inference that the minuscule

minority of defense attorneys who have argued that a moral certainty instruction should have been given (out of the hundreds of thousands of criminal adjudications during the past 50 years) would not have done so if they believed it would hurt their clients. However, this inference founders on the facts that 1) defense lawyers suffer from the same professional blinders noted by the Attorney General of Nebraska (Brief of Nebraska, p. 24); and 2) defense lawyers are hardly considered arbiters of constitutional questions. More to the point at issue here is the fact that the "moral certainty" language has been abandoned in droves by states across the country.

In sum, nothing in the conduct of counsel in this case nor in the conduct of trial counsel generally confirms that the jury in this case applied a constitutionally correct understanding of proof beyond a reasonable doubt.

F. Respondent's Failure to Address the Record as a Whole as Required by Boyde and Estelle

Respondent restricts himself to textual analysis in evaluating the reasonable likelihood that the jury was misled by the instruction, supplemented only by brief references to voir dire and argument. Petitioner argues that the textual analysis is an appropriate *starting* point for determining the constitutionality of the instruction, as in *Cage, supra*, but that *Boyde v. California*, 494 U.S. 370 (1990), and *Estelle v. McGuire*, 502 U.S. ___, 116 L.Ed. 2d 385 (1991) require an analysis of the record as a whole if textual analysis does not by itself establish a constitutional violation. Petitioner's Brief, pp. 32-34.

Respondent entirely ignores those aspects of the record specifically recognized by this Court as deserving of consideration in determining whether a jury instruction was unconstitutionally applied, particularly the comparative strength of the parties' evidence and the closeness of jury deliberations. Respondent utterly fails to address either the inherent weakness of the prosecution's case, particularly on the Wells counts, or the unusual difficulty of the jury in reaching a

verdict after some 14 days of deliberations on the Wells counts. Respondent fails to acknowledge that it is precisely where the prosecution's evidence is inherently dubious and where the jury has great difficulty in reaching a verdict that the jury is most likely to whittle down the level of certainty needed for a conviction to its bare minimum consistent with the instructions – in this case "moral certainty" – in order to reach a least common denominator to which all the jurors could subscribe.

In this case, it is highly likely that as the deliberations wore on and on, the jurors found as common ground that it was at least *probable* that petitioner committed the Wells killings – based on the bargained-for, inherently suspect, and substantially impeached testimony of the informer – and then used their adverse moral evaluation of petitioner as a gun-toting, violence-prone gang member to parlay the probability of his guilt (based on the objective evidence) to a moral certainty of his guilt (based on the objective evidence supplemented by the moral or subjective evidence of petitioner's character). It is *un*likely that after 14 days of deliberations the jurors unanimously reached a state of *utmost* certainty about petitioner's guilt; it is far more likely that they eked out a verdict based on a distinctly lesser degree of certainty apparently authorized by the moral certainty instruction.

Moreover, respondent fails to address the actions of the prosecutor in injecting moral and religious overtones into the jury deliberations in this case. Respondent conspicuously ignores petitioner's discussion of how the district attorney branded appellant as a "heathen" in argument, argued that the defense occupied a position of immorality comparable to that of an adulterer, and that the jury should pierce petitioner's courtroom mien and view him as he really was, an Hispanic street thug. See Petitioner's Brief, pp. 37-40. Jurors whose moral response to these themes appeared to be legitimated by the instruction for use in their determination of guilt may well have gone from the moral evidence that petitioner was a dangerous and predatory gang member to the "moral certainty" that he committed the specific offenses charged.

III. RESPONDENT'S PROPHECY OF CRIMINAL JUSTICE CHAOS

Respondent argues, ostensibly in support of a request that a ruling in petitioner's favor be prospective only, that "[a]pplication of *Griffith* and *Sullivan* would overturn every criminal conviction in thousands of non-final cases," resulting in a "catastrophic effect on California's criminal justice system." RB 42. Respondent paints with a brush broader than the case law can support. He is correct that *Griffith v. Kentucky*, 479 U.S. 314 (1987) would require that a ruling in petitioner's favor be applied to all non-final cases pending on appeal. However, if this Court does not find that the instruction is on its face unconstitutional, but rather that there is a reasonable likelihood, based on the record as a whole, that the jury in this case was misled, then the group of non-final appellants would not necessarily be entitled en masse to a reversal of their convictions, but only to the opportunity to make a *Boyde-Estelle* argument that constitutional error occurred under the particular facts of this case. While *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078 (1993) holds that constitutional error in a reasonable doubt instruction is reversible without recourse to a separate prejudice analysis, *Boyde* and *Estelle* require review of the record as a whole in the determination of whether error occurred, an exercise which largely subsumes prejudice analysis. Petitioner suggests that it is rare that other appellants would be able to demonstrate a similar concatenation of circumstances as occurred in this case (albeit ignored by respondent), militating toward the likelihood of an unconstitutional application of the jury instruction. Thus, respondent's forecasts of catastrophe are greatly exaggerated.

Respondent also argues that prospectivity is appropriate because "it would be impossible to determine exactly when the phrases somehow evolved from accurately describing reasonable doubt into unconstitutionally altering the burden of proof." RB 42. The reference materials cited by petitioner clearly establish that the meaning of the key phrases was incompatible with proof beyond a reasonable doubt at the

time of petitioner's trial, so that he at least is entitled to relief. Moreover, an historical review of American dictionaries reveals that the phrases "moral certainty" and "moral evidence" had acquired their current meanings by the turn of the century, well before any of the jurors sitting on petitioner's case were born.[13] Petitioner's bottom line is that at least he is entitled to relief based on his textual analysis and review of the entire record in this case. Whether this Court wishes to modify the general rule of retroactivity embodied in *Griffith* to meet respondent's concerns about widespread repercussions in the criminal justice system is a policy matter for which petitioner has neither knowledge nor standing. Petitioner's only concern is that respondent and amici are flaunting the spectre of systemic chaos to color this Court's consideration of the merits of this case.

IV. CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the Supreme Court of California.

DATED: December 20, 1993

Respectfully submitted,

ERIC S. MULTHAUP

KATHY M. CHAVEZ

Attorneys for Petitioner
Alfred Sandoval

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[13] For example, the 1906 edition of *Webster's International Dictionary of the English Language* (G. and C. Merriam Co.) (the successor to Noah Webster's original *American Dictionary of the English Language*) deleted the Wilkins quotation characterizing "moral certainty" as "indubitable," and substituted the following definition: "supported by reason or probability; practically sufficient; – opposed to *legal* or *demonstrable*; as *moral* evidence; a *moral* certainty" (emphasis in original).